

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

LAURENCE M. EARLES, )  
 )  
 Petitioner, )  
 )  
 v. ) Docket No. 22388-12SL  
 )  
 COMMISSIONER OF INTERNAL REVENUE, )  
 )  
 Respondent. )

**ORDER AND DECISION**

On March 6, 2013, respondent filed a motion for summary judgment pursuant to Rule 121.<sup>1</sup> On March 11, 2013, the Court ordered petitioner, on or before April 11, 2013, to file a response to respondent's motion for summary judgment. Petitioner has filed no response.

**Background**

The record reveals or the parties have not disputed the following background information.

On October 10, 2011, respondent sent petitioner Letter 1058, Final Notice of Intent to Levy and Notice of Your Right to a Hearing (notice of levy), with respect to petitioner's 2009 tax year. In a letter dated October 28, 2011, petitioner, through his power of attorney, Enrolled Agent James T. Marsh (EA Marsh), acknowledged receipt of respondent's notice of levy, indicated that the amount owed represented a "late filing penalty which [he] had requested abatement for reasonable cause", and requested an Appeals Office hearing.

By letter dated May 25, 2012, Settlement Officer Jackson (SO Jackson) acknowledged receiving petitioner's case and wrote:

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<sup>1</sup>Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code in effect at all relevant times.

You stated in your request that you are requesting penalty abatement which was denied by collection. But you did not indicate a reason for the appeal and submit verification of such. You will need to state a reason as to why you are requesting penalty abatement. You will need to be specific as to the penalty and provide verification of your reason. Please note IRS information indicates that you did file an extension to file Individual Income Tax Return by October 15, 2010. You did not file the return until April 21, 2011.

The letter also scheduled a telephone conference call for June 28, 2012, at 2:00 p.m. eastern time, warning petitioner that if he did not participate in the conference call or respond to this letter that a determination would be made based on the information available to her. The letter was sent to both petitioner and EA Marsh.

On July 3, 2012, SO Jackson recorded in her case activity record that neither petitioner nor EA Marsh had contacted her for the scheduled conference call. SO Jackson prepared a “last chance letter”, indicating that if petitioner desired to submit any information relevant to his case, he should do so within 14 days from the date of the letter. The letter was sent to both petitioner and EA March, but SO Jackson received no response.

On August 3, 2012, respondent issued petitioner a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330. In this notice, respondent’s Appeals Office sustained the proposed levy, determining that petitioner had failed to provide information with respect to the requested penalty abatement and that no collection alternatives, such as an offer-in-compromise or an installment agreement, had been proposed.

On September 6, 2012, petitioner petitioned this Court. The petition alleges that there is reasonable cause to abate the penalty because a Form K-1 was received “several months after the return had been filed” and “at the time of filing the return was correct to the best of the taxpayer’s knowledge.”

### Analysis

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted where there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(b). The

moving party bears the burden of proving that there is no genuine dispute as to any material fact, and factual inferences will be read in a manner most favorable to the party opposing summary judgment. Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). When a motion for summary judgment is made and properly supported, the adverse party may not rest upon mere allegations or denials of the pleadings but must set forth specific facts showing that there is a genuine dispute for trial. Rule 121(d).

Under Rule 121(d), if the adverse party does not respond to the motion for summary judgment, then this Court may enter a decision where appropriate against that party. See King v. Commissioner, 87 T.C. 1213, 1217 (1986); Shepherd v. Commissioner, T.C. Memo. 1997-555. Petitioner has not responded to the motion for summary judgment. The Court could grant respondent's motion for summary judgment on that ground alone. In any event, the record in this case shows that respondent is entitled to summary judgment on the merits of the case.

Section 6331(a) provides that if any taxpayer liable to pay any tax neglects or refuses to pay such tax within 10 days after notice and demand for payment, then the Secretary is authorized to collect such tax by levy upon the taxpayer's property. Section 6330(a) requires the Secretary to send written notice to the taxpayer of the taxpayer's right to request a section 6330 hearing before a levy is made.

Section 6330(c)(2) prescribes the matters that a person may raise at an Appeals Office hearing, including spousal defenses, challenges to the appropriateness of the Commissioner's intended action, and possible alternative means of collection. See sec. 6320(b)(4). The existence or amount of the underlying tax liability may be contested at an Appeals Office hearing only if the taxpayer did not receive a notice of deficiency or did not otherwise have an opportunity to dispute that tax liability. Sec. 6330(c)(2)(B); see Sego v. Commissioner, 114 T.C. 604, 609 (2000); Goza v. Commissioner, 114 T.C. 176, 180-181 (2000). The term "underlying tax liability" includes amounts reported due on taxpayers' returns as well as statutory interest, additions to tax, and penalties. See Montgomery v. Commissioner, 122 T.C. 1, 7-8 (2004); Katz v. Commissioner, 115 T.C. 329, 339 (2000).

In his petition petitioner's sole argument is with respect to his 2009 underlying tax liability. Petitioner's representative raised the issue in his October 28, 2011, letter, but neither petitioner nor his representative presented any evidence to SO Jackson with respect to this issue after being given a reasonable opportunity

to do so. Consequently, petitioner is precluded from raising the issue in this proceeding. See Business Integration Svcs. v. Commissioner, T.C. Memo. 2012-342, at \*3-\*4; Schwartz v. Commissioner, T.C. Memo. 2008-117, n.9, aff'd, 348 Fed. Appx. 806 (3d Cir. 2009); sec. 301.6330-1(f)(2), A-F3, Proced. & Admin. Regs. Cf. Giamelli v. Commissioner, 129 T.C. 107, 115 (2007).

Petitioner failed to propose a collection alternative during the pendency of his Appeals Office hearing and failed to provide requested financial information despite SO Jackson's providing him a reasonable opportunity to do so. SO Jackson's determination to sustain the proposed levy based on his review of the information before him was not an abuse of discretion. See D'Onofrio v. Commissioner, T.C. Memo. 2008-25; Taylor v. Commissioner, T.C. Memo. 2004-25, aff'd, 130 Fed. Appx. 934 (9th Cir. 2005).

Petitioner has failed to put before us grounds on which we could find that the Appeals Office erred in its determination. In the absence of a valid issue for review and on the basis of our review of the record, we conclude that there is no genuine dispute as to a material fact and that respondent is entitled to judgment as a matter of law.

Accordingly, for the reasons stated, it is

ORDERED that this case is stricken for trial from the May 6, 2013, Jackson, Mississippi trial session. It is further

ORDERED that respondent's motion for summary judgment, filed March 6, 2013, is granted. It is further

ORDERED AND DECIDED that respondent may proceed with the collection action as determined in the Notice of Determination Concerning Collection Action Under Section 6320 and/or 6330 for tax year 2009 upon which this case is based.

**(Signed) Michael B. Thornton**  
**Judge**

ENTERED: **APR 23 2013**